

How Can Investor-State Mediation Be More Effective: Legal Framework and Capacity of Institutions and Governments

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Abstract: In the context of Investor-State dispute settlement reform, as the systematic problems of arbitration are discussed and critiqued, mediation has gained more attention as an alternative method of solving Investor-State disputes. Mediation mechanism is perceived as cost-effective, efficient, flexible, and interest-based. Promoting mediation thus has important implications and value-added significance in ISDS reform. However, there is still something essential and critical to improve. The mediation-related provisions in international investment agreements are broad and general, which may attenuate the effective use of mediation as an alternative to arbitration. Additionally, existing mediation rules by institutions are insufficient and certain core issues should also be carefully addressed in the ongoing mediation framework of International Centre for Settlement of Investment Disputes. Capacity building and assistance offered by institutions are proceeding, which may be greatly beneficial for the culture and environment of mediation in ISDS. Furthermore, the government's capacity should also be to focus more on mediation by considering or reconsidering governance structures potentially able to overcome obstacles that states face during mediation.

Keywords: Investor-State mediation, ISDS reform, Mediation rules, Government structure

I. INTRODUCTION

Investor-State mediation (ISM) has been historically perceived as one of the alternative dispute resolution (ADR) methods that include consultation, negotiation, conciliation, mediation and other amicable settlement mechanisms in Investor-State dispute settlement (ISDS).

These ADR methods have similarities and discrepancies in their purpose and procedure. In terms of their similarities, the concepts of negotiation, conciliation, and mediation are generally conceived as amicable settlement tools for resolving Investor-State disputes. The main evidence is that many International

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Investment Agreements (IIAs) refer to these alternative methods during the cooling-off period before the initiation of arbitral proceedings, which are intended to attempt to amicably settle potential disputes and avoid escalating them. In brief, negotiation, conciliation, and mediation share the same purpose.

On the other hand, they are distinct from each other, particularly regarding the structure during these processes. Specifically, compared with mediation, negotiation is less structured, and conciliation implies a higher level of institutionalization. The disputing parties may initiate negotiations without a third party and any rule-based process. Hence, it is often subject to the parties' power asymmetries, resulting in dissatisfaction with its solutions. Regarding conciliation, ICSID (International Centre for Settlement of Investment Disputes)'s conciliation framework largely resembles its well-known arbitration structure,¹ and focuses on rights-based settlements. The rules on conciliation seem to expect the proceedings to examine the contentions the parties raise and to clarify the issues, evaluate their respective merits, and the likelihood of their application's acceptance or rejection, in arbitration or court proceedings,² which may also involve a lengthy process. They also provide for procedures related to the constitution of conciliation commission, which are almost identical to that of arbitration proceedings.³ In comparison, the mediation process lies right between that of negotiation and conciliation, with a more organized process than negotiation and less institutional management than conciliation, which focuses on the interests of disputing parties.

In current ISDS practice, arbitration has dominated in ISDS as a form of dispute resolution,⁴ whereas much less attention has been paid to other available forms of dispute resolution. However, as the operation of Investor-State arbitration, empirical evidence has increasingly reflected problems related to the procedure and mechanism of Investor-State arbitration. Specifically, the consistency, legitimacy, and predictability of Investor-State arbitration proceedings and outcomes systematically discussed and criticized are some of the reasons to explore alternatives to arbitration. Moreover, a widespread belief is that Investor-State arbitral procedure is much more lengthy and costly due to the

1 Frauke Nitschke, *The IBA's Investor-State Mediation Rules and the ICSID Dispute Settlement Framework*, *ICSID Review*, Vol. 29, No. 1, 2014, p. 113.

2 Lester Nurick and Stephen J. Schnably, *The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago*, *ICSID Review*, Vol. 1, No. 2, 1986, p. 348.

3 Articles 29, 30, 37 and 38, the ICSID Convention.

4 Arbitration cases have reached 786 among those 799 ones registered at ICSID.

complexity of specific cases, underlying treaties, proceedings, and other factors.⁵ It is said that the average cost and duration of each arbitral proceeding is respectively 8 million US dollars per party and four years and four months.⁶ In *Metalclad Corp. v. The United Mexican States*, for instance, the claimant was dissatisfied with the arbitration mechanism in virtue of the approximate five years and estimated four million dollars taken in the proceeding.⁷ In contrast to arbitration, mediation is a time- and cost-effective form of dispute resolution.

In addition, a public-minded revolution of Investor-State arbitration has occurred during the past several decades, and hence the arbitration mechanism is becoming more confrontational, transparent, and judicialized.⁸ In contrast, mediation offers a flexible and autonomous proceeding, and allows for a collaborative spirit, whereby the disputing parties attempt to appropriately understand the positive impact of investment projects, create innovative and interest-based solutions to avoid escalation of politically sensitive disputes, and thus largely preserve or restore otherwise productive investment relationships. Consequently, some hold that a fundamental characteristic of international investment promoted and protected by investment treaties is its duration and sustainability.⁹ Furthermore, for the purpose of dispute prevention and mitigation in ISDS, numbers of countries have created dispute prevention policies, or institutional arrangements intended to prevent investment disputes, for which the use of mediation may be made available at an early stage to aggrieved investors.¹⁰ In this regard, mediation is admittedly considered as a value-added aspect of ISDS in consideration of an opportunity for on-going cooperation offered in mediation between the disputants.

Therefore, in the context of ISDS reform, given the concerns about the duration and cost of existing Investor-State arbitration procedures, as well as the win-lose resolution arbitral model, ISM has gained more attention from states and the international community, and has thus been cited and offered as a

5 See UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session, 2017, A/CN.9/930/Rev.1, paras. 45-52.

6 UNCTAD, Reform of Investor-State Dispute Settlement: In Search of a Roadmap, https://unctad.org/system/files/official-document/webdiaepcb2013d4_en.pdf (Last Visited on November 22, 2020).

7 *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1.

8 Chunlei Zhao, Investor-State Mediation in a China-EU Bilateral Investment Treaty: Talking about Being in the Right Place at the Right Time, *Chinese Journal of International Law*, Vol. 17, 2018, p. 116.

9 *Ibid.*, p. 19.

10 Anna Joubin-Bret, Barton Legum, A Set of Rules Dedicated to Investor-State Mediation: The IBA Investor-State Mediation Rules, *ICSID Review*, Vol. 29, No. 1, 2014, p. 23.

compelling option for solving Investor-State disputes in ISDS reform. In this respect, it has been said that forms of ADR such as mediation have been consistently mentioned as a common theme of interest.¹¹ In the session organized by UNCITRAL Working Group III, for instance, certain members including Indonesia, the EU, Morocco, Thailand, Chile, Israel, Japan, South Africa, China, Mexico, and Peru underlined that mediation is an alternative to both Investor-State arbitration and national court recourse, and should be strengthened as a part of ISDS reform.¹² From a practical view, the tribunal in the case of *Achmea BV v. Slovakia* noted that settlement would be a better way than that in which one side wins and the other side loses.¹³

In this context, the question is not a matter of whether to implement this goal, but how to accomplish it. Thus, this paper endeavors to examine how to expand the effective use of mediation in Investor-State disputes. It is widely known that the ISDS system is mostly related to public international law and its provisions are contained *inter alia* in IIAs that are designated at the outset to protect the private sectors. Hence, it is not inconceivable that facilitating and improving the use of mediation in Investor-State disputes would involve issues related to public interest that Investor-State arbitration has faced. Apart from this, there would be certain issues of mediation that would be addressed while promoting mediation.

In this context, what is the nature of the ISM mechanism in existing legal framework and especially investment treaties? What are the imperfections of these instruments in mediation provisions in ISDS and how is it possible to use legal instruments to strengthen the impact of the ISM mechanism? What are the roles of international institutions and governments regarding the capacity to encourage the use of or to use the ISM, and how can they be improved? Therefore, this paper is divided into five sections. Section II will examine the characteristics of ISM in existing legal texts, and attempt to discuss how to

11 The Role of Mediation in ISDS, p. 3, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_webinar_mediation.pdf (Last Visited on November 25, 2020).

12 See Submission from the Government of Indonesia (A/CN.9/WG.III/WP.156); Submission from the European Union and Its Member States (A/CN.9/WG.III/WP.159/Add.1); Submission from the Government of Morocco (A/CN.9/WG.III/WP.161); Submissions from the Government of Thailand (A/CN.9/WG.III/WP.162); Submission from the Governments of Chile, Israel and Japan (A/CN.9/WG.III/WP.163); Submission from the Government of South Africa (A/CN.9/WG.III/WP.176); Submission from the Government of China (A/CN.9/WG.III/WP.177); Submission from the Government of Mali (A/CN.9/WG.III/WP.181); Submission from the Governments of Chile, Israel, Japan, Mexico and Peru (A/CN.9/WG.III/WP.182).

13 *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, 2012.

detail related provisions to provide a strong legal framework to make it more desirable and easier for disputing parties to choose this mechanism. Section III will analyze the efforts of typical and predominant institutions in the capacity of rules, administration, and services for ISM. Section IV explains the possible obstacles that governments will face when adopting mediation with investors, and then explores how to build the capacity of governments to use mediation and promote states' confidence in mediation related to ISM on the national level. Section V offers a conclusion and future prospects.

II. LEGAL FRAMEWORK: ISM IN INVESTMENT TREATIES

The vast majority of IIAs refer to the ISDS issue. According to the Investment Hub's database, out of 2,577 bilateral investment treaties (BITs), 627 provide for mediation or conciliation alternatives to arbitration in an Investor-State disputes context.¹⁴ Despite fewer references to ISM as either a simple and auxiliary tool or a detailed and separate manner for Investor-State disputes in IIAs, it is considered that incorporating mediation into the ISDS system is becoming more frequently reflected in IIAs.¹⁵ Therefore, it is necessary to examine typical provisions related to mediation in IIAs with a view to strengthen the legal basis of mediation and encourage the use of mediation. Provisions pertaining to mediation mainly consist of three types: 1) mediation during the "cooling-off period", 2) reference to mediation and other alternative models as a non-binding procedure, and 3) incorporation of the ISM mechanism.

Most traditional IIAs usually foresee a time frame before arbitration that is well-known as the "cooling-off period" or "amicable settlement period"¹⁶ with a view to averting disputes and attempting amicable settlements. Based on a supervised machine learning approach, the figure for cooling-off periods identifies that about 71 percent out of the treaties have articles related to ISDS.¹⁷ During the cooling-off period, disputing parties are invited to settlements

¹⁴ <https://investmentpolicy.unctad.org> (Last Visited on November 16, 2020).

¹⁵ *Supra* n. 8, p. 119.

¹⁶ There exists the discussion regarding the difference between "cooling-off period" and "amicable settlement period", but it is not to argue that in this article.

¹⁷ Catherine Kessedjian, Anne van Aaken, Runar Lie *et al.*, Mediation in Future Investor-State Dispute Settlement, <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/isds-af-mediation-paper-16-march-2020.pdf> (Last Visited on August 30, 2021).

with consultations and negotiations, as well as conciliation or mediation methods. Notwithstanding, the provisions of the cooling-off period in the early generation of BITs generally do not mention the specific methods available to the parties to amicably settle disputes. For instance, in the case of China's BITs, the model BIT and a vast majority out of 120 BITs¹⁸ provide for this type of provision, while few BITs mention mediation.

In general, cooling-off period ranges from three to six months. However, it is worth noting that preparation for the conduct of amicable negotiation during this period should be sufficient, particularly on the part of states. The preparation usually enables states to communicate with relevant governmental subdivision, investigate the circumstances, adopt a negotiation strategy, secure the necessary funds to organize a proper defense, and consult with external advisors to assess the case and nominate negotiators, to name a few.¹⁹ If the states have poor capacity in intragovernmental cooperation and coordination when tackling potential investment disputes, a cooling-off period with an appropriate duration would become significantly important in the present reality in which many early generation IIAs include this period involving mediation.

In terms of the second type, several IIAs mention and even encourage mediation as an alternative option to resolve Investor-State disputes. Specifically, some treaties provide that disputes between states and investors pursuant to the IIAs shall be settled amicably through negotiation that includes mediation or other mechanisms. Some treaties add more specific and relevant language linked to the former subtype of provision, providing for the time and process, and even the appointment procedure of mediators and establishment of mediation institutions. It is worth noting that mediation is non-binding during Investor-State dispute proceedings. Different from the first type of cooling-off period, this type involving two subtypes can be applied not only during the cooling-off period but also during other stages of the dispute settlement procedure.

Specifically, a few model BITs and enacted BITs provide for the first subtype. Article 14.2 of the Norway draft Model BIT 2015 provides that “[a]ny dispute under this Article shall, if possible, be settled amicably. A Party and an

18 According to the full texts available in Investment Policy Hub, the number of BITs concluded by China involves in those are in force, not yet in force and are terminated.

19 Dispute Prevention and Mitigation — Means of Alternative Dispute Resolution, 2020, A/CN.9/WG.III/ WP.190, para. 36.

investor of the other Party may agree to non-binding procedures including good offices, conciliation or mediation.”²⁰ Article 13 of China’s Model BIT 2010 says, “[a]ny legal dispute between an investor of one Contracting Party and the other Contracting Party in connecting with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute, which includes mediation.”²¹ Article 12(1) of Switzerland/Egypt BIT 2010 provides that “Disputes between a Contracting Party and an investor of the other Contracting Party relating to an investment of the latter in the territory of the former, which concern an alleged breach of this Agreement shall, to the extent possible, be settled through consultation, negotiation or mediation.”²² These BITs indicate the mediation as an amicable settlement method and having a non-binding nature.

In addition, some BITs encouraged the initial application of mediation during the cooling-off period that preceded the recourse to arbitration. Article 29.1 of the Southern African Development Community (SADC) Model BIT 2012 states that “[i]n the event of an investment dispute between an Investor or its Investment and a Host State pursuant to this Agreement, the Investor and the Host State should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party mediation or other mechanisms.”²³ The CPTPP (Comprehensive and Progressive Agreement for Trans-Pacific Partnership) states that “in the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third party procedures, such as good offices, conciliation or mediation.”²⁴ Article 20.1 of the Chile-Hong Kong, China SAR BIT 2016 says, “[i]n the event of an investment dispute, the claimant and the respondent shall initially seek to resolve the dispute through consultations, which may include,

20 Article 14.2, Norway Draft Model Bilateral Investment Treaty, 2015.

21 Wen Xiantao, Discussion on China Model Bilateral Investment Treaty (Draft) (1), *Journal of International Economic Law*, Vol. 18, No. 4, 2011, pp. 169-204; Wen Xiantao, Discussion on China Model Bilateral Investment Treaty (Draft) (2), *Journal of International Economic Law*, Vol. 19, No. 1, 2012, pp. 132-161; Wen Xiantao, Discussion on China Model Bilateral Investment Treaty (Draft) (3), *Journal of International Economic Law*, Vol. 19, No. 2, 2012, pp. 57-90.

22 Article 12(1), Switzerland/Egypt BIT 2010.

23 Article 19.1, SADC Model Bilateral Investment Treaty Template with Commentary, July 2012.

24 Article 9.18, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 2018.

where this is acceptable to the disputing parties, the use of non-binding, third-party procedures, such as good offices, conciliation and mediation.”²⁵

The second subtype contains detailed provisions to guide the use of mediation. When reviewing the IIAs and Model IIAs, these provisions reflect certain features. First, they specify the timing of applying mediation, allowing parties to begin and terminate mediation at any time, even before the cooling-off period. Article 10.4 of the Thailand Model BIT 2012 says that “[t]he disputing parties may at any time agree to good offices, conciliation or mediation. Procedures for good offices, conciliation or mediation may begin at any time and may be terminated at any time.”²⁶ Article 17 of the Netherlands Model Investment Agreement 2019 provides that “[s]uch settlement may be agreed at any time, including after proceedings under this Section have been commenced.”²⁷

Second, they clarify the relationship between mediation and other dispute resolution methods including those related to domestic resolution. On one hand, mediation could be in tandem with arbitration proceedings, and would be prioritized over other alternative dispute settlement methods such as conciliation without other agreements. Article 10.4 of the Thailand Model BIT 2012 says “[s]uch procedures may continue while the matter is being examined by an arbitral tribunal established under this Article, unless the disputing parties agree otherwise.”²⁸ Apart from this, both the International Institute for Sustainable Development (IISD) Model International Agreement on Investment for Sustainable Development 2006 and the Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area 2007 provide that “[w]here no alternative means of dispute settlement are agreed upon, parties shall seek the assistance of a mediator to resolve disputes during the [required] cooling-off period.”²⁹ On the other hand, the Investment Agreement signed between Chinese Mainland and Hong Kong Special Administrative Region (HKSAR) on June 28, 2017 under the framework of the Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA) indicates the fork-in-the-road clause between mediation and domestic methods

²⁵ Article 20.1, the Chile-Hong Kong, China SAR BIT, 2016.

²⁶ Article 10.4, the Thailand Model BIT, 2012.

²⁷ Article 17, the Netherlands Model Investment Agreement, 2019.

²⁸ *Supra* n. 26.

²⁹ Article 42, the IISD Model International Agreement on Investment for Sustainable Development, 2006; Article 26, the COMESA Common Investment Area, 2007.

such as the judicial process or administrative review.³⁰

Third, some treaties provide for specific appointment procedures of mediators and particular mediation centers or agencies. For instance, when the parties have recourse to mediation during the cooling-off period, “[t]he potential disputants shall use a mediator from the list established by the Secretariat for this purpose, or another one of their joint choosing. If no mediator is chosen by the disputing parties prior to three months before the expiration of the cooling-off period, a mediator from the Secretariat list who is not a national of a State Party or the investor shall be appointed. The appointment shall be binding on the disputing parties.”³¹ Additionally, these provisions set out the possibility of establishing mediation institutions. Pursuant to the CEPA Investment Agreement, Chinese Mainland and HKSAR provided their counterpart investors with a mediation approach that included specific mediation agencies or institutions handling disputes between Chinese Mainland and HKSAR.³² IISD Model IIA states that “[t]he Parties may also establish regionally-based mediation centres to facilitate the resolution of disputes between Parties and investors or investments”.³³

For the third type, a set of comprehensive mediation rules of Investor-State disputes are incorporated into IIAs, which are mainly those recently concluded by the EU. This paper reviewed the EU-Canada CETA Union Comprehensive Economic and Trade Agreement (EU-Canada CETA) of 2016, the EU-Singapore Investment Protection Agreement of 2018 (EU-Singapore IPA), and the EU-Vietnam Investment Protection Agreement 2018 (EU-Vietnam IPA). All of the bodies of these treaties provide for separate provisions of mediation for Investor-State disputes, introducing the mediation mechanism procedure and the mediators’ code of conduct as integral parts of these treaties as annexes or adopted by the mandated committee.

In terms of the mediation provisions in the bodies of these treaties, both Article 8.20 of the EU-Canada CETA and Article 3.4 of the EU-Singapore IPA refer to the temporal availability of mediation, the application for additional rules of mediation, the time limit, the suspension of the prescribed period to

30 Articles 19.3 and 19.4, the Mainland & Hong Kong Closer Economic Partnership Arrangement Investment Agreement, January 1, 2018.

31 *Supra* n. 29.

32 *Supra* n. 30, Articles 19.1(v) and 20 (iv).

33 Article 42, the IISD Model International Agreement on Investment for Sustainable Development, 2006.

submit a claim or a request for consultation, and the relationship with other proceedings.³⁴

Apart from more detailed language, which resembles the second type's subtype, this type integrates a set of additionally specified rules for mediation. By and large, the rules of procedure for mediation cover issues such as its objective, initiation of proceedings, selection of the mediator, rules of the mediation procedure, implementation, general provisions involving confidentiality, relationship to dispute settlement, time limits, costs, and review.³⁵ The above-mentioned three treaties signed by EU also provide for the mediator codes of conduct, which generally concern provisions for the mediator's responsibilities and duties, as well as requirements for ethics and independence.³⁶

Reviewing all of these types of mediation in IIAs, issues of timing and mandatory mediation are critical for promoting mediation. Usually, there are four key points of time to initiate mediation between the parties, i.e., before the notice of arbitration, after the notice of arbitration, after the start of arbitration, and after the decision is rendered. As mentioned above, the treaties with detailed requirements provides for the timing of mediation that can be commenced and terminated at any time throughout the Investor-State dispute process.

34 For greater articulation, Article 3.4 of the EU-Singapore IPA provides: 1. The disputing parties may at any time, including prior to the delivery of a notice of intent, agree to have recourse to mediation. 2. Recourse to mediation is voluntary and without prejudice to the legal position of either disputing party. 3. Recourse to mediation may be governed by the rules set out in Annex 6 (Mediation Mechanism for Disputes between Investors and Parties) or such other rules as the disputing parties may agree. Any time limit mentioned in Annex 6 (Mediation Mechanism for Disputes between Investors and Parties) may be modified by mutual agreement between the disputing parties. 4. The mediator shall be appointed by agreement of the disputing parties or in accordance with Article 3 (Selection of the Mediator) of Annex 6 (Mediation Mechanism for Disputes between Investors and Parties). Mediators shall comply with Annex 7 (Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators). 5. The disputing parties shall endeavour to reach a mutually agreed solution within sixty days from the appointment of the mediator. 6. Once the disputing parties agree to have recourse to mediation, paragraphs 3 and 4 of Article 3.3 (Consultations) shall not apply between the date on which it was agreed to have recourse to mediation, and thirty days after the date on which either party to the dispute decides to put an end to the mediation, by way of a letter to the mediator and the other disputing party. 7. Nothing in this Article shall preclude the disputing parties from having recourse to other forms of alternative dispute resolution.

35 Annex 6, the EU-Singapore Investment Protection Agreement, 2018; Annex 10, the EU-Vietnam Trade and Investment Agreement, 2018. It is also noted that, EU-Japan Economic Partnership Agreement 2018 does not refer to Investor-State dispute settlement.

36 Annex 7, the EU-Singapore Investment Protection Agreement, 2018; Annex 11, the EU-Vietnam Trade and Investment Agreement, 2018.

For further speaking, if disputing parties attempt to conduct mediation before the arbitration proceeding, mediation would take place during or before the cooling-off period, as well as during the period after the notice but before the start of arbitration. In this regard, several cases have been identified that had recourse to some form of mediation.³⁷ A reasonable interpretation of mediation conducted at an early stage is intended to avoid escalating the conflict between parties and is easier to contemplate the all-round relationship other than financial aspects.

However, one of the concerns in this scenario is whether the nature of mediation is non-binding or mandatory. A survey conducted by Queen Mary University of London in 2019 showed that 64 percent of investors interviewed were in favor of the introduction of a mandatory requirement to undergo mediation before arbitration proceedings.³⁸ However, most respondents expressed concern that the mandatory imposition of mediation would increase the cost and duration of the whole process. Likewise, states also have expressed inconsistent views on this issue. A submission that Indonesia proposed in UNCITRAL referred to mandatory mediation after the exhaustion of consultation as a preventative and mitigating method,³⁹ while some states emphasized that mediation should not be forced on parties.

In this respect, it is not advisable and realistic to make mediation compulsory for all. In the context of ISM's development, the mechanism is still in its preliminary phase, with insufficient empirical studies and capacity. Moreover, in terms of specific disputes arising between investors and states, mediation might not be applicable to and suitable for all of them. Furthermore, where a mutually agreeable resolution may not be available, there is a power imbalance between states and investors, particularly small and medium investors, and there is little hope or chance of repairing their broken-down investment relationships. Hence, given the states' different legal and social cultures regarding mediation, voluntary states could consider the binding mediation before

37 *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5; *Balkan Energy (Ghana) Limited v. Republic of Ghana*, PCA Case No. 2010-7; *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2; *KBR, Inc. v. United Mexican States*, ICSID Case No. UNCT/14/1; *Methanex Corporation v. United States of America*, UNCITRAL; *Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12; *Olyana Holdings v. Rwanda*, ICSID Case No. ARB/10/10.

38 *Supra* n. 17, pp. 10-11.

39 Submission from the Government of Indonesia, 2018, A/CN.9/WG.III/WP.156, para. 19.

arbitration in ISDS by amending, superseding, or concluding their IIAs for modernization and meeting their own needs by providing for specific timing and steps to guide disputing parties.

Furthermore, in practice, disputing parties may participate in settlement discussion through mediation during the formal arbitration proceedings, resulting in either a settlement agreement or converting settlements into arbitral consent awards.⁴⁰ The awards involving a negotiated agreement can be perceived as an externally posited obligation, which can help state representatives concerned about political reactions or personal liability to settle cases with investors, as well as enable full force and effect under the New York Convention.⁴¹ On the other hand, there is a concern over the enforcement of the confidential settlement agreement. A study explained that 60 percent of cases settled amicably in Investor-State arbitrations were not embodied in the final arbitral awards.⁴² It is widely believed that the Convention on International Settlement Agreement Resulting from Mediation (Singapore Convention on Mediation) in 2018 is applicable to the settlement in the ISDS context. However, the contracting states are granted the right to make a reservation as to their application of the Convention to the settlement agreement to which the state is a party, or to which any governmental agency or any person acting on behalf of a government agency is a party.⁴³ Although there is a proposition that settlement accords that impose obligations that parties willingly assume are often complied with voluntarily,⁴⁴ the outcomes might still be at risk of overturn due to such as political factors, judicial sovereign immunity or the parties' public opinions.

In short, modification or replacement of old generation IIAs, or conclusion of new IIAs, is the most direct way to compellingly encourage the uptake of mediation in the ISDS framework.⁴⁵ This may include more detailed

40 Rule 43, the ICSID Arbitration Rules 2006; Article 36.1, the UNCITRAL Arbitration Rules 2010.

41 Wolf von Kumberg, Jeremy Lack and Michael Leathes, Enabling Early Settlement in Investor-State Arbitration — The Time to Introduce Mediation Has Come, *ICSID Review*, Vol. 29, No. 1, 2014, p. 140.

42 ICSID's New Mediation Rules: A Small But Positive Step Forward, p. 6, https://icsid.worldbank.org/sites/default/files/amendments/public-input/Ubilava_Notage_10.17.2018.pdf (Last Visited on December 1, 2020).

43 Article 8.1(a), the Singapore Convention on Mediation.

44 Chapter 4 Settlement of Investor-State Disputes through Mediation Preliminary Remarks on Processes, Problems and Prospects, p. 100, <https://www.researchgate.net/publication/331344136> (Last Visited on December 5, 2020).

45 Sarah J. K. Rauber, Investor-State Mediation in International Investment Dispute Settlement — A Critical, Integral, Multi- and Transdisciplinary Analysis, p.29, <https://ssrn.com/abstract=3115955> (Last Visited on December 1, 2020).

language related to the start and termination of mediation, realistic time frame, relation to arbitration and other resolution mechanisms, flexible pre-arbitration requirements, and even specific mediation rules and mediators' codes of conduct. However, given the large volume and fragmentation of existing IIAs, it will be difficult to accomplish this work. Despite this, combined with institutions' efforts towards mediation capacity and reforms of mediation's national governance structure, there would also be opportunities to promote ISM based on existing IIAs involving settlement with general or broad language.

III. INSTITUTION CAPACITY ON MEDIATION

A. Rules on Investor-State Mediation

Apart from mediation provisions as the legal basis in IIAs, rules on mediation or other ADR methods for Investor-State disputes published by international organizations have provided amicable settlement capacity through offering alternative dispute resolution tools. In other words, these instruments delineating guidance on the use of mediation and other ADR methods would likely assist states with implementing their IIAs provisions providing for mediation in legal texts, as well as with enabling potential parties to conduct a practice-based time and cost efficient settlement discussion.

As a predominant institution devoted to serving and administering Investor-State disputes, ICSID has adopted and is developing certain rules on ADR. These instruments involve the Conciliation Rules adopted in 1967, Fact-Finding Additional Facility Rules adopted in 1978, and a set of stand-alone Investor-State Mediation Rules (ICSID Mediation Rules) first proposed in 2018 as part of a broader amendment to ICSID's rules of procedure. ICSID thus far has issued four versions of mediation rules for investment disputes.⁴⁶ These rules are part of a broader effort to update and further modernize the Centre's procedural rules for resolving investment disputes, and will be the first institutional mediation rules designed specifically for investment disputes.⁴⁷ In addition, UNCITRAL adopted its Conciliation Rules in 1980, and creatively achieved

46 ICSID Working Paper on Amendment (August 2018); ICSID Updated Working Paper on Amendment (March 2019); ICSID Updated Working Paper on Amendment (August 2019); ICSID Updated Working Paper on Amendment (February 2020).

47 Investor-State Mediation, <https://icsid.worldbank.org/services/mediation-conciliation/mediation/overview> (Last Visited on December 1, 2020).

the Singapore Convention on Mediation⁴⁸ in 2018, which may strengthen the completeness of the ISM rules framework as providing for enforceability of settlement agreements.⁴⁹

In addition, other commercial organizations and specifically organized bodies also provided certain guidelines for investment mediation or commercial mediation that may apply to investment disputes. For instance, the Energy Charter Conference (ECC) adopted the Guide on Investment Mediation (ECC Guide) specifically applying to Investor-State disputes under the Energy Charter Treaty in 2016. Furthermore, the International Bar Association (IBA) adopted the *ad hoc* Rules for Investor-State Mediation in 2012 (IBA Rules) that is not associated with any particular dispute resolution institution, as well as the International Chamber of Commerce (ICC) and Arbitration Institute of the Stockholm Chamber of Commerce (SCC), which adopted the related Mediation Rules in 2014 that may apply to investment disputes in a broad context of commercial disputes.⁵⁰

In summary, there are several sets of typical alternative rules for investment disputes or conflicts. These include mediation rules mainly designed for commercial conflicts, which certain institutions have proposed. Recent institutions' efforts on the rules of mediation can be perceived as a response to institutions providing a greater mediation capacity to reflect their objective to achieve a greater breadth of dispute resolution tools.⁵¹ On the other hand, IBA mediation rules are the only specialized rules of mediation for resolving investment disputes between states and investors. In some instances, states and investors may favor them over rules more closely related to commercial disputes.

About 33 percent of the Investor-State disputes were settled or discontinued (from 1987 to 2018),⁵² which spans all economic sectors and almost all of the world's underlying legal instruments and major geographic regions.⁵³

48 United Nations Convention on International Settlement Agreements Resulting from Mediation, 2019, G. A. Res. A/73/198.

49 Though the scope of this Convention only refers to "commercial disputes", it is construed to be applied equal to Investor-State disputes with the spirit it embodies and ICSID has also recognized the possibility of using the Convention in Investor-State disputes.

50 The ICC Mediation Rules 2014; the SCC Mediation Rules 2014.

51 Updated Backgrounder on Proposals for Amendment of the ICSID Rules, https://icsid.worldbank.org/sites/default/files/amendments/WP_4_Backgrounder_EN.pdf (Last Visited on August 30, 2021).

52 UNCTAD, World Investment Report 2019, p. 104, https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf (Last Visited on December 5, 2020).

53 *Supra* n. 1, p. 132.

Although there is no additional information about the reasons for the settlement and discontinuity, this seems to indicate that the states and investors from different backgrounds usually welcome ADR methods such as mediation, conciliation, and consultation to pursue amicable settlement outcomes during arbitral or conciliation proceedings. In contrast, to date, only 13 conciliation cases have been registered in ICSID⁵⁴, while no administrative service for mediation has been provided under ICSID,⁵⁵ even though there are rules on mediation and other ADR tools. In addition, ten attempts to use mediation or conciliation, besides arbitration or independently,⁵⁶ have been identified. Out of these, only one, *Systra SA v. Philippines*, is explicitly reported under the IBA Rules,⁵⁷ showing that the use of rules for alternatives to Investor-State disputes is relatively rare in practice.

Based on this, while existing rules on investment mediation might be adopted for settled or discontinued Investor-State disputes, the public have no access to the real picture of the effect of using mediation and other alternative methods. Moreover, the current rules guiding mediation in Investor-State disputes have little impact, while these mediation rules and other dispute resolution rules such as arbitration rules are not in place to support a more amicable settlement.

Related to the predicament of ISDS mediation in practice, the new stand-alone mediation rules on Investor-State disputes proposed in ICSID are noticeably necessary and merited. In the context of ISDS reform and ICSID Rules amendment, new ICSID mediation rules would proceed with the assistance of multi-stakeholders' engagement towards a more desirable and acceptable result that may have a greater impact on the use of ISM compared with other existing mediation rules. In addition, these rules as an integral part of ISDS reform can be coordinated with other updating mechanisms such as arbitration, which may bring a positive spillover effect. However, the new mediation framework in the ICSID Rules would mainly present an alternative option coupled with the reform of the Investor-State arbitration mechanism.

To this end, this mediation rules framework in ICSID is the right place to

54 <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx> (Last Visited on December 1, 2020).

55 *Supra* n. 19, p. 43.

56 *Supra* n. 17, p. 9.

57 IN AN APPARENT FIRST, INVESTOR AND HOST-STATE AGREE TO TRY MEDIATION UNDER IBA RULES TO RESOLVE AN INVESTMENT TREATY DISPUTE, <https://www.iareporter.com/articles/in-an-apparent-first-investor-and-host-state-agree-to-try-mediation-under-iba-rules-to-resolve-an-investment-treaty-dispute/> (Last Visited on November 15, 2020).

more closely examine cautiously designed rules of mediation for Investor-State disputes. In other words, when developing the mediation rules framework, it is necessary to tackle essential matters that are critical for promoting and using mediation for Investor-State disputes, which also contributes to promoting integration and coordination of the ISDS mechanism.

Given that the registered or disclosed ADR cases are much less than those settled or discontinued, this suggests that disputing parties tend to favor the settlement based on using confidential negotiation, conciliation, or mediation methods that do not need to comply with explicitly stipulated rules. In other words, figuring out how to appropriately address the transparency of ISM mechanisms could be somewhat related to developing Investor-State mediation rules. It is particularly due to states' reluctance to disclose sensitive information of specific cases when they opt for an amicable settlement method.

It is widely believed that we cannot deliberate the ISDS mechanism by-passing transparency given that one of the participants is a sovereign state and possible third parties have their own interests. Specifically, compared with commercial arbitration, Investor-State arbitration emphasizes transparency due to its focus on public law. In contrast, commercial arbitration traditionally views mediation as confidential. Indeed, data suggests that amicable settlements increase the probability of confidential settlement agreements.⁵⁸ An empirical survey showed that only 43 percent of data for commercial settlement cases was available to the public in relation to their benchmarks such as these cases' facts, parties, and amounts, contrasting with the figure for Investor-State arbitration cases, which was at 98 percent.⁵⁹

However, some hold that there should be something new in the context of ISM, which contrasts with traditional commercial mediation. As a consequence, certain guides that international institutions have issued offer innovative concepts of confidentiality and transparency, which considers the features of ISDS. For example, Article 10 of the IBA Rules provides that the mediation process shall be private, including all documents prepared and communications made in connection with the mediation, both of which shall not be used for any other purpose, particularly including legal proceedings. However, this

58 Ana Ubilava, *Amicable Settlements in Investor-State Disputes: Empirical Analysis of Patterns and Perceived Problems*, p. 26, <http://ssrn.com/abstract=3352181> (Last Visited on November 25, 2020).

59 Nottage, Luke R. and Ubilava, Ana, *Costs, Outcomes and Transparency in ISDS Arbitrations: Evidence for an Investment Treaty Parliamentary Inquiry*, *International Arbitration Law Review*, Vol. 21, No. 4, 2018.

confidentiality obligation shall not extend to a) the fact that the parties have agreed to mediation or a settlement resulting from the mediation; b) the terms of a settlement or partial settlement; and c) the disclosure of documents or information in which seven conditions are listed.⁶⁰ All of the above requirements, whether related to confidentiality or specified exceptions, are subject to any agreement between the parties and mediator(s). In this respect, the Rules consider both sides. On one hand, they deviate from mediation's typical confidentiality and guide the parties to disclose fundamental aspects such as the existence of mediation and terms of a settlement agreement. On the other hand, they preserve the autonomy of will of either party, allowing them to make appropriate decisions as needed.

In addition, the ECC Guide offers similar guidance regarding the issue of transparency. It suggests that although any information should be confidential unless otherwise provided in any agreement between parties, laws or court orders, it is reasonable that parties disclose the fact that mediation is taking place and the settlement's main aspects, due to the requirement for states to allow increased transparency.⁶¹

However, recent versions of ICSID mediation rules have nuanced differences regarding the disclosure of "the fact that the parties are mediating or have mediated". This is a disclosure in the second and third versions, but is inverted in the subsequent version, both of which are subject to the parties' consent. This disclosure is definitely contentious. One possible reason for the latest change in the ICSID version may be to attract more states to adopt the ICSID Mediation Rules. This is based on a concern that exposing early stages of discussions to public scrutiny can hinder efforts at mediation, thereby creating

60 Article 10(3), the IBA rules. Article 10(3)(c) states the seven conditions: the disclosure of documents or information: i) prepared by the disclosing party in connection with the mediation, if they contain no information provided by any other party or the mediator and do not refer to the mediation; ii) as evidence that a settlement agreement was reached when any other party disputes it; iii) for the purpose of enforcing or homologating a settlement agreement, subject to any requirement provided in the agreement; iv) to comply with a pre-existing legal disclosure obligation that was made known to the other parties in the agreement to mediate or at the Mediation Management Conference, provided that the disclosure shall be as limited as permissible; v) to comply with a court order or similar instrument requiring disclosure, provided that the disclosure shall be as limited as permissible and shall be made only after written notice to the other party or parties and the mediator, and an opportunity to contest the disclosure under such order or instrument; vi) required to prevent a serious crime or eminent threat to public safety, provided that the disclosure shall be as limited as is reasonable in all circumstances; and vii) that, at the time of disclosure, has demonstrably entered into the public domain through no direct or indirect breach of the confidentiality obligations set forth above.

61 10.C, the ECC Guide on Investment Mediation.

pressure that can lead to posturing and unproductive dialogue.

Moreover, the ECC Guide expresses the idea of an internal monitoring mechanism. This mechanism is designed to respond to states' concerns, such as corruption, political allegations, and public criticism by requiring the state's representative in mediation to regularly report to a group of officials with full access to the mediations' files about their progress and any of the mediator's proposals.⁶²

In short, it is important to remember that flexibility and inclusion are some of ISM's multilateral tools. Given the insufficient capacity of states' mediation as well as public goods and services, it is reasonable to start by proposing more acceptable standards for the ICSID Mediation Rules.

B. Technical Capacity-building of Mediation by Institutions

Beyond the theoretical guidance on and rules for ISM mentioned above, there has been a gap in understanding of its practical applications due to a lack of familiarity with mediation and risk aversion in a novel context.⁶³ In this context, technical capacity and assistance for using ISM should be equally important. Participants such as Thailand, South Africa, and Costa Rica in the session organized by the UNCITRAL Working Group III indicated that awareness, knowledge, and capacity of ISM must be promoted on an international level.⁶⁴

In order to achieve this goal, international institutions competent in offering assistance for ISM's technical capacity have an indispensable role. The effective way of providing this assistance is by providing opportunities for technical cooperation as well as training and capacity-building sessions, while also fostering local experts to draw on readily available international standards, tools, and expertise.⁶⁵ This can develop a broader pool of capable facilitators and resources in ISDS cases.

The focus for mediation is to identify and train competent mediators. Although many experts specialize in investment mediation, many more of them are professional mediators with limited skills and experience related to international

⁶² *Supra* n. 60.

⁶³ Susan D. Franck and Anna Joubin-Bret, *Investor-State Mediation: A Simulation*, *ICSID Review*, Vol. 29, No. 1, 2014, p. 91.

⁶⁴ *Supra* n. 18, p. 8.

⁶⁵ Guidance Note on Strengthening United Nations Support to States, Upon Their Request, to Implement Sound Commercial Law Reforms, para. 15, https://uncitral.un.org/sites/uncitral.un.org/files/englishguidance_note.pdf (Last Visited on November 22, 2020).

investment disputes, and those who are experts in ISDS — most often in arbitration — but who are less familiar with specific techniques and approaches necessary for successful mediation.⁶⁶ Hence, a competent mediator's skillset is varied, complex, and not easily made. To specifically identify the mediators needed in ISDS, in 2016, the International Mediation Institute (IMI) proposed the Competent Criteria for Investor-State Mediators (IMI Criteria) aimed at assisting parties, institutions, designating authorities, and other appointing bodies with selecting competent and suitable mediators or co-mediators.⁶⁷ The IMI Criteria lists six considerations for choosing Investor-State mediators, including: 1) an understanding of Investor-State issues; 2) experience in mediation and other dispute resolution processes; 3) experience with different forms of negotiation, mediation and conciliation; 4) an understanding of arbitration and adjudication; 5) intercultural competency; 6) and other competencies.⁶⁸ These criteria indicate that a qualified mediator's knowledge encompasses an overall understanding of the Investor-State system that includes substantive and process aspects, along with different dispute settlement mechanisms including mediation, negotiation, conciliation, arbitration, and adjudication, as well as different cultures related to not only legal systems but also political and social backgrounds.

In this regard, mediator training is needed to enable potential mediators to meet these standards. For instance, ICSID has undertaken cooperative effort with the Energy Charter Secretariat and CEDR to run training programs for Investor-State mediators held in Washington, Paris, and HKSAR to foster a growing cadre of trained mediators capable of understanding the complexities and process of ISDS, which will enable states and investors to become more confident with using mediation in a variety of investment disputes.⁶⁹

Apart from mediator training programs, capacity building sessions and fora as well as varied tools are effective ways to appeal to states who are currently less interested in mediation and inform those who intend to mediate in future disputes arising from investors and states about mediation's exact use and process. Specifically, these sessions refer to knowledge and new developments of ISM, the assessment of legal reform that governments and authorities have

66 ICSID's Role in Advancing Investor-State Mediation, <https://www.imimediation.org/2019/09/04/icsid-role-in-advancing-investor-state-mediation/> (Last Visited on November 28, 2020).

67 IMI Competency Criteria for Investor-State Mediators, p. 1.

68 See IMI Competency Criteria for Investor-State Mediators.

69 ISDS Mediation Working Group, *Unlocking Value through Stakeholder Engagement: New Forms to Resolve Investor-State Disputes, 2020 ISDS Mediation Working Group Report*, 2020, p. 7.

taken, the drafting of national legislation involving implementation of international texts, along with the use of international texts by organizations or agencies. For example, ICSID has also sponsored a high-level mediation education forum for state and investor representatives.⁷⁰ IMI offers a sophisticated case analysis tool called Olé, which is intended to help parties and their counsels identify both parties' positions and interests, and thus develop an optimal case strategy.⁷¹

An advisory center has also been proposed as a tool for enhancing mediation capacity. This center would be possibly tasked with alternative dispute settlements, and could also be a platform for exchanging best practices as well as for administering alternative dispute settlement.⁷² This type of center is generally supported as an option for reforming arbitration in ISDS,⁷³ which might assist and support the use of arbitration, provide general advisory services, as well as build capacity and share best practices.⁷⁴ If an advisory center for mediation is potentially established, current arbitration center may be a suitable example. Nevertheless, although this center is expected to become a useful tool for building ISM's capacity, it will encounter obstacles. For instance, it might be difficult to secure financing since it is unknown whether states are willing to fund a center aimed at an alternative to arbitration. Furthermore, another potential option is a multilateral standing body that provides institutional support to encourage amicable settlements. This is a more ambitious option that will need additional discussion in the future.

IV. NATIONAL CAPACITY OF ISM: GOVERNMENT STRUCTURE

Adequate local capacity to enact, enforce, implement, apply, and interpret sound commercial law frameworks is necessary for the accrual of the expected

70 International Mediation Institute, Response to ICSID on Its Invitation to File Suggestions for Rule Amendments, p. 5, <https://icsid.worldbank.org/sites/default/files/amendments/public-input/20.%20IMI.pdf> (Last Visited on November 28, 2020).

71 International Mediation Institute, Olé! Online Dispute Analysis Tool, <http://www.imimmediation.org/ole> (Last Visited on November 28, 2020).

72 *Supra* n. 18, p. 47.

73 Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-eighth Session (Vienna, 14-18 October 2019), A/CN.9/1004, 2019, para. 28, <https://undocs.org/A/CN.9/1004> (Last Visited on December 5, 2020).

74 Possible Reform of Investor-State Dispute Settlement (ISDS), A/CN.9/WG.III/WP.168, <https://undocs.org/en/A/CN.9/WG.III/WP.168> (Last Visited on December 5, 2020).

benefits of rule-based commercial relations and international trade.⁷⁵ While interest in and discussions on the mediation mechanism in ISDS are increasing, it seems that many states are still unfamiliar with this mechanism, and also lack knowledge and capacity of ISM in a national context.

In 2016, the Centre for International Law (CIL) of the National University of Singapore conducted a survey regarding obstacles to settlement in Investor-State disputes. This survey indicated that states might undergo much more pressure than investors when opting for mediation in ISDS.⁷⁶ Furthermore, given that the ISDS mechanism relates closely to public interests and public policies, state parties are expected to persuade themselves and their constituencies of their correct stance.⁷⁷ To this end, states and their political actors must be under scrutiny from the general public and gradually implement their obligations under prescribed international laws and decisions to avoid public criticism and political allegations while relying on due process to obtain public funds to defend themselves in investment disputes. Otherwise, political actors responsible for resolving investment disputes would undertake political risks. As a result, public servants may prefer to engage in a formal dispute with a designated arbitrator. Even when the outcome is not in their favor, they can shift the blame for it onto the “higher powers” that made the ruling⁷⁸ despite the drawbacks of time and cost, which ranked first in this survey.

In short, some of the above-mentioned obstacles are political, such as “the desire to defer or avoid responsibility”, “fear of public criticism”, and “the risk of allegations of or future prosecution for corruption”; others arise from coordination among governmental departments, such as “the difficulty of getting the budgetary approval for settlement”, and “the existence of multiple stakeholders”.⁷⁹ In that regard, a way that attempts to obtain a greater capacity to coordinate and negotiate in Investor-State disputes with mediation may make sense. It may also embody policy making and the establishment or reconstruction of governance structure, thereby delicately influencing the awareness of ISM in host states.

⁷⁵ *Supra* n. 64, p. 14.

⁷⁶ Report: Survey on Obstacles to Settlement of Investor-State Disputes, <https://cil.nus.edu.sg/wp-content/uploads/2018/09/NUS-CIL-Working-Paper-1801-Report-Survey-on-Obstacles-to-Settlement-of-Investor-State-Disputes.pdf> (Last Visited on December 5, 2020).

⁷⁷ Stephen M. Schwebel, Is Mediation of Foreign Investment Disputes Plausible? *ICSID Review*, Vol. 22, No. 2, 2007, pp. 240-241.

⁷⁸ *Supra* n. 68.

⁷⁹ *Supra* n. 75, pp. 14-15.

First of all, an overarching political and legal framework is needed, which reflects the state's overall strategy and arrangement for mediation in ISDS. Notwithstanding, there is a surprising concern identified at educational fora and supported in the CIL survey, which is the absence, in many states, of a state policy and protocol for managing Investor-State disputes.⁸⁰ In contrast, multilateral companies frequently have implemented policies supporting the use of mediation and other non-adversarial alternatives, providing an answer to internal critics and to adversaries who mistake a willingness to negotiate for weakness.⁸¹ Hence, policies on mediation could be construed that states and corporations have a consensus that mediation is a tool for solving investment conflicts, which can legitimize political actors and defend them from criticism and allegations.

Based on overall policies, states and governments are expected to build institutional frameworks to prevent and manage investment disputes, which includes policy arrangements and requirements. As a result, governments can efficiently implement policies related to mediation mechanisms. Specifically, the institutional and policy structure includes issues on agencies regarding management of investment disputes that includes mediation, in addition to statutory requirements dealing with the authority, obligations, and responsibilities of agencies involved in settlements between states and investors, as well as the efforts of promotion and use of mediation in civil society and commercial institutions.

First, some governments have identified lead agencies or created multi-agency commissions. These agencies are usually designed to comprehensively address the problems and complaints generated during early-stage foreign investment. As such, they may have an explicit mandate to negotiate a possible settlement with investors before proceeding to arbitration, and represent the state once arbitration begins.⁸² For instance, the Korean government established an ombudsman agency known as the Foreign Investment Ombudsman, mandated by the 1998 Foreign Investment Promotion Act, one aim of which is to solve problems and conflicts with foreign investors.⁸³ Brazil has been

80 Mark E. Appel, A "Done Deal" for States and Investors? *Journal of Enforcement of Arbitration Awards*, Vol. 1, No. 2, 2018, p. 11.

81 *Ibid.*, p. 9.

82 Silvia Constain, Mediation in Investor-State Dispute Settlement: Government Policy and the Changing Landscape, *ICSID Review*, Vol. 29, No. 1, 2014, p. 31.

83 Foreign Investment Ombudsman, Ombudsman's Message, <http://ombudsman.kotra.or.kr/eng/au/message.do> (Last Visited on December 5, 2020).

promoting an ombudsman model on direct investment in its Cooperation and Facilitation of Investments Agreement (CFIA), one duty of which is solving problems and complaints that range from investment facilitation measures under CFIA to specific issues affecting investments.⁸⁴ The explicit empowerment and specific agency tasked with seeking a settled outcome with investors may promote states' confidence in adopting mediation in a context of Investor-State disputes.

That being said, opponents argue that in light of the complex structure of governments including central and local governments, the practical relevance of interests generally involves multiple officials and departments. That is to say, there may be immense difficulties in yielding a consistent voice among several ministries whose interests may be impacted either positively or negatively if a settlement is reached. In this case, it may prolong mediation proceedings in consideration for the interest of and coordination with multiple stakeholders, and consensus among them, which does not align with mediation's efficiency. In addition, consensus may be uneasy since government ministries occasionally have different and even competing priorities. Consequently, the lead agency seems unable to overcome the setback of the use of mediation and produce an efficient outcome, even though it offers a legal opportunity to adopt mediation to solve investment disputes.

However, the lead agency may be more effective than as mentioned. It may act as a coordinator among multiple stakeholders by facilitating efficient communication contributing to amicable settlements. For example, the multi-agency commission where the lead agency guides and convenes authorities adopting disputing measures and other ministries whose interests lie in settlement agreements may be deemed as an intragovernmental tool for communication, cooperation, and coordination among multiple stakeholders.

Apart from lead agencies, the investment promotion agency (IPA) that is aimed at promoting investment and has somewhat of a broad understanding of investment issues and investors may also help the building of governance structure for mediation in the context of ISDS. In some systems, IPAs can assist investors in contacting a government, so that the investor may have recourse to this agency when problems occur. Moreover, IPAs also cooperate with government agencies to improve the investment climate by adopting specific

84 The Cooperation and Facilitation Investment Agreement.

measures.⁸⁵ In that situation, the IPAs may be in an appropriate position to address or assist with addressing conflicts by acting as a mediator. In other systems, IPAs affiliated with governments may contribute by providing professional advice when preparing and conducting mediation in ISDS.

Second, specific legislation is essential. It provides for not only establishing and operating the agencies and commissions mentioned above, but also for issues related to financial support, liability, and review. The legal mandate for institutions and officials responsible for solving disputes based on an alternative method is the legal basis that may encourage authorized institutions and officials to try adopting mediation without political and legal apprehension. Moreover, as mentioned above, there is a general shortage of a formal fiscal budget mechanism or procedure for alternative resolution, making it difficult for government officials to obtain financial support when mediating with investors. In this regard, creating a budgetary approval mechanism for a settlement may increase support for mediation in ISDS. In addition, some systems require a higher authority to review or approve any agreement with investors.⁸⁶ This could function as a corrective mechanism intended to quickly prevent abuses of authority and could also relieve the fear of personal responsibility that the authorized government official who represents the state has when negotiating with the investor.

Furthermore, mediation's promotion and success in a broad commercial context may make states more open to mediation with investors, which is due to increased familiarity with mediation's operation as cases of commercial mediation increase. Establishing and functioning arbitration or mediation centers, or combining these centers, can render administration services for mediation and accumulate mediation experience, which may provide best practices and models for mediation between investors and states.

For instance, the Singapore International Commercial Court, Singapore International Arbitration Centre and Singapore International Mediation Centre provide "arbitration+mediation" services to solve cross-border disputes. Likewise, in the context of China's Belt and Road Initiative, it established two international commercial courts respectively in Shenzhen and Xi'an in 2018, handling a range of international commercial disputes between equal commercial bodies and providing one-stop services for litigation, arbitration, and

⁸⁵ *Supra* n. 81, p. 36.

⁸⁶ *Ibid.*

mediation.⁸⁷ In 2015, China and African countries established the China-Africa Joint Arbitration Center specifically for dealing with Investor-State and commercial disputes regarding investment and business between China and African countries through arbitration, mediation, and conciliation.⁸⁸ In addition, the Asian International Arbitration Centre released the newly revised Mediation Rules (2018) that can be adopted for investment disputes involving investors and states.⁸⁹

In that light, we can notice practices from different cultures and innovative models for ISDS, such as “arbitration+mediation” that may offer new perspectives on reforming the ISDS system.⁹⁰ On the other hand, most practical instances of national mediation are still in commercial context but we can analyze them from a broader perspective and long-term understanding. For one, the international community has a different perception of the concept of “commercial”, and thus in certain situations, commercial issues include those related to investment. As a result, it may eventually be possible that Investor-State disputes are explicitly included in commercial institutions. In addition, despite limitations in the jurisdiction for equal commercial entities, they may also tend to accumulate experience and human resources, as well as foster an environment and culture of mediation that is an alternative to arbitration.

V. CONCLUSION: VALUE-ADDED AND FUTURE PROSPECTS

The role of mediation in ISDS, by all accounts, is predicted to expand. Thus, we need to examine how to make the mediation mechanism more practical in the ISDS system. First, reconsidering mediation provisions under investment treaties is a straightforward way to internally change the climate of ISM. Second, rules on ISM as a database, particularly the mediation settlement procedure offered by ICSID, will enable the international community to access information about a dispute for which there are attempts being made to achieve an

87 The China International Commercial Court (CICC) in 2018, <http://cicc.court.gov.cn/html/1/219/208/209/1316.html> (Last Visited on December 7, 2020).

88 http://www.shiac.org/CAJAC/index_E.aspx (Last Visited on December 7, 2020).

89 <https://www.aiac.world/Mediation-Mediation> (Last Visited on December 7, 2020).

90 Huiping Chen, China's Innovative ISDS Mechanisms and Their Implications, *American Society of International Law (Unbound)*, Vol. 112, 2018, p. 210.

amicable settlement through the mediation process.⁹¹ Nitschke also highlights that once the mediation rules finalized and approved by ICSID Member States, they will provide states and investors with a valuable dispute settlement option that complements many other initiatives that states and practitioners are engaging in nurturing the development of Investor-State mediation.⁹² In addition, more specialized mediators, empirical assessments, as well as administration and services, in addition to institutions' capacity-building activities may provide a way to provide external incentives that encourage parties to consider mediation more seriously.⁹³ Furthermore, it is useful to pay more attention to the capacity of states *per se*, since more effectively designed government structure can create suitable opportunities for mediation.

ISM may have more value-added in the context of a modernized and sustainable rule-based environment. Mediation in ISDS may *inter alia* aid the transformation of perceived zero-sum games into positive-sum games⁹⁴ since mediation's interest-based nature has led to the perception that it can contribute towards more stable and long-term investment environments. As a result, if implemented correctly, mediation's harmonious outcomes can coincide with the sustainable development goals.

Nevertheless, it should be remembered that the complexity of Investor-State disputes mean that mediation is expected to have limited efficacy. From a holistic ISDS system perspective, mediation is not only an alternative, but also a complementary opportunity.⁹⁵ Therefore, the mediation mechanism in the context of ISDS reform may be personalized as well as systematized.

Further, mediation of Investor-State disputes has developed with the decentralized approach that creates mediation infrastructure based on commercial context that responds to mediation demands,⁹⁶ and is moving towards a decentralized and centralized approach in parallel. However, this mechanism is still in its initial phase, and its effectiveness has not yet been systematically

91 *Supra* n. 41, pp. 4-5.

92 *Supra* n. 65.

93 James M. Claxton, Compelling Parties to Mediate Investor-State Disputes: No Pressure, No Diamonds? *Pep-Perdine Dispute Resolution Law Journal*, Vol. 20, 2020, p. 99.

94 *Supra* n. 44, p. 37.

95 Claudia Caluori, Guidelines for Mediation in Investor-State Disputes, <https://heinonline.org/HOL/LandingPage?handle=hein.journals/ybinar6&div=20&id=&page=> (Last Visited on August 30, 2021).

96 Mediation of Investor-State Conflicts, *Harvard Law Review*, Vol. 127, No. 8, 2014, p. 2563.

tested.⁹⁷ As the development of the mediation mechanism framework involves a legal basis and capacity building that is within the ISDS context, we need more empirical experience that can reflect the instruments that regulate the reform of this mechanism in ISDS.

⁹⁷ *Supra* n. 68, p. 10.